DATO' TAN TOH HUA & ORS

v.

TAN TOH HONG & ORS

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-02-725-1997]
13 JANUARY 2001

COMPANY LAW: *Winding-up - Opposition to petition - Costs of company's legal representation in opposing petition - Whether directors can utilise funds and assets of company to fund costs*

CIVIL PROCEDURE: *Injunction - Damages - Failure to provide undertaking as to damages - Justice of case - Whether warrants an injunction - Whether overrides requirement to provide undertaking as to damages*

This was the appellants' appeal against the decision of the High Court granting injunctions against them. The injunctions were obtained by the first and second respondents ('R1 and R2') to restrain the appellants from utilising the funds and assets of the third respondent company ('R3') to fund the costs of R3's legal representation in opposing the winding-up petition against it.

The appellants argued that: (i) the costs of R3's legal representation should not be a ground for the issuance of injunctions; and (ii) R1 and R2 should provide an undertaking as to damages which they had failed to do as the injunctions sought were interlocutory in nature.

R1 and R2 submitted that R3's funds should not be expended defending the petition which was presented in a shareholder's dispute.

Held:
Per Ahmad Fairuz JCA

[1] It is a general principle of company law that a company's money should not be expended on disputes between shareholders. If it is shown that the directors of a company expended the company's money in resisting a member's winding-up petition based on the just and equitable ground, the court should step in and prevent such expenditure.

[2] Questions in respect of financial ability should not affect the position in regard to what is the essential justice of the case. In *Pengkalen Securities Sdn Bhd v. Leow Li Lian*, the plaintiff there was not required to give an undertaking as to damages since the injustice that would be caused to that plaintiff was greater if the injunction was not allowed. The circumstances in the instant appeal were the same.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan perayu-perayu terhadap keputusan Mahkamah Tinggi dalam memberikan injunksi terhadap mereka. Injunksi tersebut diperolehi oleh responden-responden pertama dan kedua ('R1 dan R2') bagi menghalang perayu-perayu daripada menggunakan dana-dana dan aset-aset syarikat responden ketiga ('R3') bagi membiayai kos perwakilan undang-undang R3 dalam menentang petisyen terhadapnya.

Perayu-perayu berhujah bahawa: (i) perwakilan undang-undang R3 tidak seharusnya menjadi alasan bagi pengeluaran injunksi; dan (ii) R1 dan R3 seharusnya memberikan satu akujanji berhubung gantirugi yang mana mereka telah gagal untuk laksanakan kerana injuksi yang dipohon adalah bersifat interlokutori.

R1 dan R2 berhujah bahawa dana R3 tidak seharusnya dibelanjakan untuk membela petisyen yang telah dikemukakan dalam satu pertikaian pemegang saham.

Diputuskan:
Oleh Ahmad Fairuz HMR

[1] Adalah merupakan prinsip undang-undang syarikat bahawa wang syarikat tidak seharusnya dibelanjakan atas pertikaian antara pemegang-pemegang saham. Jikalau dapat ditunjukkan bahawa pengarah-pengarah sesebuah syarikat telah membelanjakan wang syarikat untuk menentang petisyen penggulungan atas alasan yang adil dan saksama, mahkamah haruslah menghalang perbelanjaan yang sedemikian.

[2] Persoalan keupayaan kewangan tidak seharusnya menjejaskan kedudukan berhubung dengan apakah keadilan yang penting dalam sesuatu kes. Dalam *Pengkalen Securities Sdn Bhd v. Liew Li Lian*, plaintif telah tidak dikehendaki memberikan akujanji berhubung dengan gantirugi oleh kerana ketidak-adilan yang boleh disebabkan ke atas plaintif adalah lebih besar jika injunksi tidak dibenarkan.

[Rayuan ditolak dengan kos.]

Case(s) referred to:

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 ***(foll)***

Pengkalen Securities Sdn Bhd v. Leow Li Lain [1997] 5 CLJ 440 ***(foll)***

Re a company (No 004502 of 1988), ex p Johnson [1992] BCLC 701 ***(foll)***

Re Union Accident Insurance Co Ltd [1972] 1 All ER 1105 ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 42(1)

For the appellants - J Kannaperan (Gurmeet Kaur with him); M/s Shearn Delamore & Co

For the 1st & 2nd respondents - Isabella de Silva (HY Chong with him); M/s Azman Davidson & Co

For the 3rd respondent - Logan Sabapathy (Izral Khairi with him); M/s Logan Sabapathy & Co

[Appeal from High Court, Kuala Lumpur; Companies (Winding-Up) No: D1-28-283-1997]

Reported by Usha Thiagarajah

JUDGMENT

Ahmad Fairuz JCA:

This is a judgment under s. 42(1) of the Courts of Judicature Act 1964 as the chairman of this court had retired by the time this judgment was arrived at. Accordingly the term "we" in this judgment refers to Dato' Abu Mansor, JCA (now Federal Court judge) and Dato' Ahmad Fairuz, JCA (now Federal Court judge).

This is an appeal against the decision of the High Court at Kuala Lumpur in granting injunctions against the appellants. The injunctions were applied for by the first and second respondents (R1 and R2) by way of summons-in-chambers dated 4 September 1997 (encl. 31).

On 22 July 1997, R1 and R2 (the petitioners) had presented a petition to wind-up the third respondent (R3). On 7 August 1997, the petitoners obtained an order to appoint provisional liquidators. R3 is a party to the petition. It was contended that R3 is largely a nominal party because the nature of the disputes giving rise to the petition and the appointment of the provisional liquidators are disputes which are purely between shareholders. The Board of Directors of R3, however, is in control of the shareholders who oppose the petition ie, the appellants. It was alleged that the appellants, as directors of R3 had engaged the firm of Messrs. Raja,

Darryl & Loh to act as the solicitors for R3 in relation to the petition. R3 had in fact taken active part in opposing the petition and the appointment of the provisional liquidators. This, according to the petitioners, would "incur great expense to" R3. Such expense would be "entirely unnecessary" in the light of the fact that the disputes are between shareholders (para. 12 of the affidavit of R1 and R2 at p. 179 of Appeal Record (AR)). It was also alleged that several shareholders had moved for an order discharging the appointment of the provisional liquidators whilst R3 had also made a similar application. The end result, according to the petitioners would be a duplicity of applications at the expense of R3 (para. 14 of the affidavit of R1 and R2 at p. 179 AR). For these reasons the petitoners feared that the funds and assets of R3 may be utilised to fund the opposition of the petition. Hence the application for the injunctions against the appellants (para. 15 of affidavit of R1 and R2 at p. 180 AR).

The appellants deny that R3 is a nominal party. To them views of R3 ought to be taken into account at the hearing of the petition. They contend that costs of R3's legal representation is not a ground for the issuance of injunctions.

Before us, counsel for the appellants argued that:

(a) a company's board of directors has residuary power to appoint solicitors to oppose the petition. On this issue, we were referred to the case of *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd.* [1991] 3 CLJ 2078 wherein the Supreme Court pointed out that the case of *Re Union Accident Insurance Co. Ltd.* [1972] 1 All ER 1105 held *inter alia* that "notwithstanding the appointment of the provisional liquidator and the general assumption by him of the company's powers the board still retained certain residuary powers which included authority to instruct solicitors and counsel to oppose the petition and if a winding-up order is made, to appeal against the order." The Supreme Count then quoted the following passage from the judgment of Plowman J at p. 1113:

> Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it. If that is true in regard to the petition itself, it is, in my judgment, equally true of interlocutory proceedings which are such that it would not be appropriate for the provisional liquidator to give instructions on behalf of the company.

On the basis of these authorities, the learned counsel contended that with the injunctions, the residuary powers of the board would be restrained;

(b) the petitioner's allegation that the expenses incurred in getting representation for R3 is a misuse of corporate funds for the personal benefits of the appellants cannot warrant the issuance of the injunctions. This, at best, urged the learned counsel, can only be a complaint sounding in damages. Thus, the appellants argued that the petitioners had failed to establish that there is a serious issue to be tried on the matter of the appellants having acted in breach of their fiduciary duty in having R3 represented;

(c) even if there is a serious issue to be tried, the balance of convenience would not be in favour of granting the injunctions as the provisional liquidator is already in control of the funds and assets of R3 and any dispositions of R3's assets would be void after the presentation of the petition;

(d) the injunctions sought by the petitioners are interlocutory in nature. As such, undertaking as to damages is mandatory. And the petitioners have not provided that undertaking.

The learned counsel for the petitioners submitted that:

(a) R3 is not a party to encl. 31 which is directed to the appellants;

(b) the injunctions sought are not interlocutory. As such the undertaking as to damages is not required;

(c) residuary powers of the directors are limited to proceedings relating to R3 in the ordinary course of business and for the benefit of R3 as a whole;

(d) the use of R3's funds by the appellants is only permissible, according to art. 79 of R3's articles of association, for the normal business of R3 and defending a petition presented in a shareholder's dispute is not a normal business of R3;

(e) improper expenditure means breach of fiduciary duties and misfeasance. It would therefore be wrong to permit representation of R3;

(f) the nature of the allegations in the petition are of wrongs by the appellants and not against R3.

In *Re a company (No. 004502 of 1988) ex parte Johnson* [1992] BCLC 701 Harman J (at p. 702 and 703) said:

The principle was drawn to the profession's attention by the decision of Hoffman J in *Re Crossmore Electrical & Civil Engineering Ltd.* [1989] BCLC 137 at 138, where he said:

> The company is a nominal party to the 459 petition, but in substance the dispute is between the two shareholders. **It is a general principle of company law that the company's money should not be expended on disputes between shareholders.**

That reminder of the classic view was based by Hoffmann J on *Pickering v. Stephenson* [1872] LR 14 Eq 322, so **nobody can suggest that it is a new development in the law.**

It was exemplified as a proposition of law in the decision of Plowman J in *Re A, & B C Chewing Gum Ltd. Topps Chewing Gum Inc. v. Oakley* [1975] 1 All ER 1017, [1975] 1 WLR 579, where **a petition for the just and equitable winding up** of the company A & B C Chewing Gum Ltd. had been brought against the two directors and shareholders by the other shareholder, the company being a nominal respondent to that just and equitable petition as well. The petition succeeded and a winding-up order on the just and equitable ground was made, as appears from the report.

In the appeal now before us, the petition was presented pursuant to s. 218(1)(f) and (i) of the Companies. And the petition under s. 218(1)(i) is for a winding-up on just and equitable grounds. Hence we see no reason why the above-quoted passage from Harman J's judgment cannot apply to the facts and circumstances in the appeal now before us. In the same case, Harman J at p. 704 continued thus:

> The **train of authority being well established**, it seems to me quite clear that, if it is shown that directors of a company have been **causing the company's money to be spent on financing the resistance** either to a 'pure' s. 459 petition or, according to Plowman J in *Re A & B C Chewing Gum Ltd.* and myself in *Re Hydrosan Ltd*, in financing the company's resistance **to a member's winding-up petition based on the just and equitable ground, the court should prevent** such expenditure. Such expenditure is a misfeasance, there is no excuse for it in law and it is not a question of an arguable case being raised showing that it may be right to permit misfeasances. Misfeasances are not matters that are permitted by the courts and there is no question of an arguable case at all.

With this passage in mind, we are unable to say that the learned judge had exercised his discretion wrongly when he granted the injunctions prayed for.

As to the issue of the petitioners' failure to provide an undertaking as to damages, we agree with Edgar Joseph Jr J (as he then was) when in the case of *Cheng Hang Guan & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors.* [1988] 3 MLJ 90 he said:

> In any event, the court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross undertaking in damages would be of limited or of no value. So, for example, in *Allen v. Jambo Holdings Ltd*. the Court of Appeal held, when granting a Mareva injunction, that a cross undertaking was acceptable from the plaintiffs although he was legally aided. **The rationale behind this was that questions of financial ability ought not to affect the position in regard to what is the essential justice of the case.**

In fact the case of *Pengkalen Securities Sdn. Bhd. v. Leow Li Lain* [1997] 5 CLJ 440 held that it was not necessary for the plaintiff to give an undertaking as to damages since the injustice that could be caused to the plaintiff was very great if the injunction was not allowed. We would hold the same view in the light of the facts and circumstances existing in this appeal.

For the reasons stated, in particular in paras 7 and 8, we hereby dismiss the appeal with costs.